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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 20.

THOMAS W. WHITE, individually and as former Collector of Internal Revenue,

Petitioner,

v.

PHILIP J. ARONSON, Trustee,

Respondent.

BRIEF FOR THE RESPONDENT.

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ISRAEL GOROVITZ,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 20.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER,

v.

PHILIP J. ARONSON, TRUSTEE, RESPONDENT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts (R. 10–14) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals for the First Circuit (R. 59–62) is reported in 87 F. (2d) 272.

JURISDICTION.

The case is before this Court on a writ of certiorari, a petition for same having been granted on May 3, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The sole question presented for the determination of this Court is whether the jig saw picture puzzles in controversy were subject to tax as "games and parts of games" under Section 609 of the Revenue Act of 1932.

STATEMENT.

The petitioner, in order to buttress his argument that there is substanial evidence in the record to support the general finding of the trial court, even under the definition of the word "game" adopted by the Circuit Court of Appeals, has made a strained effort to collect under his Statement evidence which is assumed to have this probative value. This evidence is considered *infra,* page 26.

The attention of the Court is invited to the following facts, not mentioned in petitioner's Statement, which are undisputed and conclusively established by the record in the case at bar.

Jig saw puzzles and picture puzzles of the jig saw type have been manufactured since the early part of the Nineteenth Century and perhaps as early as the American Revolution (R. 16, 19). The unanimous opinion of experts and of manufacturers and distributors of both games and jig saw puzzles is to the effect that a jig saw puzzle or picture puzzle of the jig saw type is not a game (R. 15, 23, 25, 29, 35). In the terminology of the trade a jig saw puzzle is not a game (R. 15, 23). The word "game", in its trade signification, means articles or instrumentalities employed in a contest between two or more persons according to a set of rules, where there is competition, an uncertain outcome and a winner and loser (R. 16, 23, 25, 31, 35).

There are no rules, however, for the solution of a jig saw puzzle (R. 16, 26, 31). The word "game", in the terminology of the trade, never includes either puzzles or toys, all three constituting separate and distinct types or categories of amusement devices (R. 15, 24).

Children are at least as adept as adults in solving jig saw puzzles and sometimes they are rather smarter than their parents in doing them (R. 16, 26, 36). Children can solve picture puzzles in excess of 50 pieces (R. 16, 26) and the puzzles manufactured by the Viking Manufacturing Company, Inc., were as readily soluble by children as by adults. Even the 162 piece puzzle was too easy for children (R. 27, 30).

From February 25, 1919, to December 31, 1921, jig saw and picture puzzles were manufactured and sold without being subject to tax as games under the provisions of Section 900 (5) of the Revenue Act of 1918 (R. 19). On August 26, 1932, the Commissioner made an unpublished ruling that jig saw puzzles were not subject to tax under Section 609 of the Revenue Act of 1932 (R. 20). This ruling was reversed on February 7, 1933, the ruling being given prospective operation only (Deft's Ex. A, R. 39). On April 20, 1933, the ruling of February 7 was again reversed in part, the tax being given retroactive effect to puzzles made on or after June 21, 1932 (Deft's Ex. B, R. 40). No tax was assessed or collected with respect to sales of jig saw or picture puzzles prior to the ruling of the Bureau of Internal Revenue in S. T. 567, published on November 14, 1932 (R. 19, 41).

In holding that the article in controversy was not subject to tax under Section 609 of the Revenue Act of 1932, the Circuit Court of Appeals ruled that the article

here sought to be taxed is a puzzle (R. 61) and not a game.

STATUTE, REGULATIONS AND RULING INVOLVED.

1. Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 609. TAX ON SPORTING GOODS.

"There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games* (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods." (U. S. C., Title 26, c. 20B, p. 1186.) (Italics ours.)

2. Regulations 46, promulgated under the Revenue Act of 1932 by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on June 18, 1932, provide:

"ART. 53. SCOPE OF TAX.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to *all similar articles commonly or commercially known as* sporting

goods, *games, and parts of games* (except playing cards and children's toys and games).

"The term 'sporting goods' includes all articles *of the same general character as those specifically named,* the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport. (Italics ours.)

"The term 'game' includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

"ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, ping-pong sets, roulette wheels, backgammon sets, etc.

. . . . . .

"ART. 56. ARTICLES NOT SUBJECT TO TAX.—Gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars and similar articles, are not subject to tax as sporting goods or games."

. . . . . .

3. XI-2 Cumulative Bulletin 481: XI-46-5856

REGULATIONS 46, ARTICLE 55: Games S. T. 567

"Taxability of jig saw puzzle as a game.

"Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig saw puzzles as games.

"The word 'games', as used in section 609 of the Revenue Act of 1932, does not mean the games

themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed., 658, T. D. 3401, C. B. I-2, 297). Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles, or games, are of the type ordinarily designed for the use of children, they are not taxable.

"A jig saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig saw puzzle contains more than 50 pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932."

SUMMARY OF ARGUMENT.

On the facts disclosed by this record and the applicable rules of statutory construction, the decision of the Circuit Court of Appeals is correct. In commercial or trade usage a puzzle is not a game. The fact that the article in controversy is not a game in the terminology of the trade is conclusively established by the record. The law is clear that the word "game" in Section 609 was used by Congress in this sense in which it is understood by the trade. *Philadelphia Storage Battery Co.* v.

Lederer, 21 F. (2d) 320, *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan,* 280 Fed. 624.

The construction adopted by the Circuit Court of Appeals is not only the meaning of the word "game" in trade terminology but also its common and ordinary meaning. Tested by the rule of primary use or adaptation (*Universal Battery Co.* v. *United States,* 281 U. S. 580) the article in controversy is not a game. The jig saw picture puzzle is not primarily designed for or adapted to use as a game and the mere possibility of its use in competition does not make it a game, since many articles which are admittedly non-taxable may be adapted to competitive use. The petitioner's argument would apply with equal force to the cross word puzzle, as to which there has been a ruling that it is not taxable under Section 609. The discrimination between jig saw picture puzzles on the one hand and cross word puzzles and other types of puzzles, on the other hand, has not been and can not be satisfactorily explained by the petitioner.

The petitioner's argument that jig saw picture puzzles are taxable as "games" because they afford recreation, amusement or diversion is founded upon a patent fallacy. Because a game is defined as an amusement or diversion, it does not follow that everything which furnishes amusement or diversion is a game. *Illfelder* v. *United States,* T. D. 31115, 19 T. D. 59.

There is no substantial evidence in the record to support a finding of fact that the articles in question are games, but the general finding of the District Court is not a finding that such is the fact, but rather a mixed conclusion of law and fact which is based upon an erroneous constuction of the statute.

Notwithstanding the strained effort of the petitioner

to bring the article in controversy within the definition of "game" adopted by the Circuit Court of Appeals, it is obvious that a puzzle is basically and generically different from a game and that Congress, in imposing a tax upon games, did not intend to include puzzles of any kind.

The decision of the Circuit Court of Appeals finds support in the doctrines *ejusdem generis* and *noscitur a sociis*. The definition for which petitioner contends would lead to utterly absurd consequences since it would obviously bring within the application of the statute innumerable articles which are not games, even though they do afford recreation, amusement or diversion.

The construction which was adopted by the Circuit Court of Appeals finds ample support in the legislative history of the tax on games as enacted into the Revenue Act of 1932 and prior revenue laws. The administrative construction or interpretation under these prior revenue laws supports the contention of the respondent in this case that jig saw picture puzzles are not taxable. The failure of the Commissioner to tax jig saw picture puzzles under the 1917 and 1918 Acts, although they were well known commercially and popularly, shows that the administrative construction prior to the ruling in S. T. 567 on November 14, 1932 was that jig saw picture puzzles were not taxable as games.

The ruling of the Commissioner which imposes a tax upon puzzles containing in excess of 50 pieces is arbitrary, unreasonable and violative of the Fifth Amendment to the Constitution of the United States. The record discloses that the basis of classification adopted was entirely unreasonable, the difficulty of such puzzles being dependent not so much upon the number of pieces they contain as upon other factors, such as the size of

the pieces, shape of the cuts, coloring, etc. (R. 16, 32, 36).

The ruling of the Commissioner in S. T. 567 was preceded and followed by inconsistent rulings on the same subject matter, which disclose his uncertainty as to the taxable status of the jig saw picture puzzle. The construction adopted by the Commissioner should not be sustained, since it constitutes an unwarranted assumption of broad powers of statutory construction by an administrative official, powers which, as the record discloses, are tantamount to an improper exercise of the legislative and judicial function.

While there can be no doubt that the construction adopted by the Circuit Court of Appeals is correct, if any doubt exists the case calls for the application of the well known rule of doubt. *Gould* v. *Gould,* 245 U. S. 151.

There is nothing in the ouija board or slot machine cases which is inconsistent with the decision of the Court below. The decision in the slot machine case supports rather than weakens the construction for which the respondent contends. Each case must be decided on its own facts. While there is language in those cases which seems to support a broader construction of the word "game" than was adopted in the instant case, those decisions were correct on their facts. The decision of the Circuit Court of Appeals that jig saw picture puzzles were not intended to be taxed as games under Section 609 is not in conflict with the decisions in the oujia board and slot machine cases, and if there is any conflict in reasoning, the construction adopted by the Court in the case at bar is more reasonable than the broader construction for which the petitioner contends.

ARGUMENT.

I. IN ITS COMMERCIAL OR TRADE USAGE A "PUZZLE" IS NOT A "GAME".

The uncontradicted evidence in the record establishes the fact that a "puzzle" is not a "game" in the language or terminology of the trade. Mr. George S. Parker, who testified to this effect (R. 15, 16, 21, 22), has been a manufacturer and inventor of both games and puzzles for over fifty years and is probably the outstanding expert in his field. He stated that in the terminology of the trade the word "game" never includes either puzzles or toys; that, in his opinion, a jig saw puzzle is not a game and never was; that, as a manufacturer of games and puzzles, he would define a game as "a contest between players or sides, as usually expressed, for the purpose of determining the winner and for the purpose of amusement", and according to a set of rules; and that a "puzzle" is simply a "puzzle" and is so understood commercially. The evidence of other witnesses (R. 23–26, 29, 31, 35, 36) was to the same effect. Nor is there any evidence to the contrary.

The respondent submits that the words "games and parts of games" were used in Section 609 of the Revenue Act of 1932 in the sense in which they were understood by the trade. That section imposes a tax upon certain articles sold by "the manufacturer, producer, or importer", and since it is directed to a particular class, it is logical to conclude that the words employed by Congress were used in their commercial sense as understood by that class.

Nix v. *Hedden,* 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745.

Sonn v. *Magone,* 159 U. S. 417.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan*, 280 Fed. 624.

Philadelphia Storage Battery Co. v. *Lederer*, 21 F. (2d) 320.

In *Nix* v. *Hedden, supra,* this Court held that a tomato was taxable as a "vegetable" although, in its botanical sense, it was a fruit, "there being no evidence that the words 'fruit' and 'vegetable' have acquired any special meaning in trade or commerce . . ." (at p. 306).

In *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan, supra,* the Court, in holding that sweet cider was not taxable as a "soft drink", expressly relied upon the trade significance of the term "soft drinks". It was said in that case (p. 629):

> "It is plain that the term 'soft drinks', had a *trade significance* and comprehended different kinds of soft drinks, as used in the 1917 Act.
>
> ". . . Congress was clearly using this expression 'soft drinks' not to distinguish one class of beverages from another from the viewpoint of a prohibition or license act, but to distinguish soft drinks from the other items of the statute from a *technical trade-name aspect.*" (Italics ours.)

The attention of this Court is particularly invited to the admirable language of Judge Dickinson in the case of *Philadelphia Storage Battery Co.* v. *Lederer, supra,* in which it was held that storage batteries were not "parts or accessories" for automobiles within the meaning of Section 900 of the Revenue Acts of 1918 and 1921. He said (pp. 321, 322):

> "The argument for the plaintiff begins of course by invoking the doctrine that tax laws, as the ex-

pressions go, are to be construed 'most strongly' against the United States and 'most favorably' to the taxpayer. The true doctrine, as it has been stated to be, is that neither the executive nor the judiciary nor both combined can directly impose a tax. What cannot be done directly cannot be done by indirection under the guise of construing a tax law. Congress alone has the power to tax.

"This takes us to the act itself. It is not an altogether correct view, but, for the purposes of the case, we may look upon this as a tax imposed upon things, those which are taxed being designated by the names which Congress has applied to them. We thus find what is taxed by finding the things which bear the names or labels which Congress has applied to what is taxed, and we recognize them by names or labels by which so designated. If the thing claimed to be taxed is not so known, then it is not subject to the tax. *Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. The command here is directed to 'manufacturers, producers and importers' of the 'articles' named. It is, because of this, a fair inference that Congress spoke to them in their own language. This means that the phrases of the law are to be given the meaning they have in the trades concerned.*

. . . . . .

"As we view it, the question is one of identification, and the test is whether the 'article' attempted to be taxed is the 'article' upon which the tax has been imposed by law. *This brings it pretty close to a question of trade nomenclature or terminology.*

"Our finding is that there is no such thing as an 'automobile storage battery' or a 'storage battery for automobiles' in the nomenclature of the trade, and no 'article' or thing so known. It follows that the plaintiff did not make or sell any. What it sold were 'storage batteries', and they are not taxed by the Act." (Italics ours.)

Under these authorities the terminology of the trade is an important factor in determining the construction to be given to the phrase "games and parts of games" in the statute under consideration. The Commissioner himself has recognized the force of these decisions in ruling on the taxability of other articles under the excise tax provisions of the Revenue Act of 1932. In S. T. 823 (XIV-2, Cumulative Bulletin 369), for example, he said, in holding that electrical transcriptions used for broadcasting purposes and motion-picture records of the "sound-on-disk" type are not taxable as "records for phonographs" under Section 607 of the Act:

"There is strong and ample judicial authority for the view that for the purposes of the excise tax the Bureau should ascertain the *commercial significance* of the words 'records for phonographs' and construe them accordingly. (*American Net & Twine Co.* v. *Worthington,* 141 U. S. 468; *Sonn* v. *Magone,* 159 U. S. 417; *Philadelphia Storage Battery Co.* v. *Lederer,* 21 Fed. (2d), 320.) From evidence submitted it is obvious that in the industry concerned a very definite distinction is made between phonograph records and electrical transcriptions and that the latter are not *commercially known* as 'records for phonographs'." (Italics ours.)

The trial court said, on the question of trade terminology (R. 18):

> "I do not care how the trade felt about it. It is going to be how this court feels about it that determines it."

The refusal to give this undisputed evidence the weight to which it is entitled under the adjudicated cases was substantially prejudicial to the plaintiff and, in and of itself, warranted the reversal of its judgment by the Circuit Court of Appeals.

II. IN ITS COMMON AND ORDINARY MEANING A "PUZZLE" IS NOT A "GAME".

Entirely apart from the overwhelming and uncontradicted evidence in this record that the word "games" does not include puzzles, in the terminology of the trade, it is submitted that there are inherent differences between "puzzles" and "games", in their ordinary and accepted meaning, which militate against the construction for which the petitioner contends.

In Webster's New International Dictionary (2nd Edition, Unabridged, 1935) seventeen definitions are given of the word "game". In none of them is the word "puzzle" referred to. The most detailed definition is the fourth definition, which is as follows:

> "A contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake. *Games of chance* include all games in which chance is the sole or a considerable factor in determining the outcome, as in dice and in most card games. Most gambling games are of this description. *Games of skill* include those in which skill is the sole or chief

factor, as in chess, whist, draughts, billiards. *Athletic games* include all contests having in view the development or exercise of muscular strength, skill, or agility, as baseball, football, tennis, the field and water sports, etc. *Cf.* SPORT. The public contests of the ancients, which included dramatic shows as well as athletic contests, were called *games* in English. See AGON."

The same dictionary defines "puzzle" as—

"Something which perplexes or embarrasses; a difficult problem or question; an enigma; hence, a toy, contrivance, question, or problem designed for testing ingenuity; as a cross word *puzzle*."

And a "jig saw puzzle" as—

"A kind of puzzle made by sawing or cutting a picture into small pieces which may be fitted together."

In Murray's Oxford Dictionary (1933) a "jig saw puzzle" is defined as—

"A puzzle formed by cutting into small irregular pieces with a jig saw a picture mounted on a sheet of thin wood."

In holding that the article in controversy is not taxable under Section 609 of the 1932 Act the Circuit Court Court of Appeals expressly ruled that "A jig saw picture puzzle comes squarely within this definition,—'a contrivance . . . designed for testing ingenuity'." (R. 61.)

The word "puzzle" has always had a well known and distinct meaning in the English language. The picture puzzle is of ancient origin and is one of the oldest pas-

times known to man.[1] The dictionary definitions of the word "puzzle", as well as the evidence in this record (R. 15, 16, 19), convincingly establish the fact that puzzles in general and picture puzzles of the jig saw type in particular bear no kinship to "games" as ordinarily understood.

A game is always played according to a set of rules and its outcome is always uncertain. The ultimate score or result can never be predicted with certainty beforehand, since a game is capable of variations. There is no pre-knowledge of the result, score or outcome.

A jig saw picture puzzle, on the other hand, is a problem with only one correct answer or solution. There are no rules applicable, each person solving it in his own way. There is no scoring, no uncertain or variable result. It is in fact incapable of variations and its outcome can be predicted with certainty. As with a mathematical problem, there is only one correct answer or result—the completed picture.

Thus the construction of the phrase "games and parts of games" adopted by the Circuit Court of Appeals is not only the meaning in the trade but is the common and ordinary meaning of the phrase in everyday language.

Oehley v. *Rex* (1908) E. D. C., p. 38 (Cape of

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[1] The picture puzzle was known in China and Egypt thousands of years ago. In Murray's Oxford Dictionary (1909) a Chinese puzzle is defined, under the general term "puzzle", as—

> "One of the ingenious puzzles made by the Chinese in which the problem is to fit together the dissected pieces of a geometrical or other figure . . . The name was applied first to the dissected square called 'tangram', hence, fig., any specially intricate puzzle or problem."

So, in Facts—The New Concise Pictorial Encyclopedia, a jig saw puzzle is described as follows:

> "Jig saw puzzle, consisting of many pieces of 'thin' wood or cardboard cut in different shapes which, when correctly fitted together, form a complete picture. Known in ancient Egypt."

Good Hope Law Reports, Eastern Districts Court).

In this case the defendants were convicted of playing a game on the Lord's Day in violation of an ordinance. The Court allowed the defendants' appeal and quashed the conviction and sentence. Judge Graham said (pp. 41, 42):

"In my opinion the section does not make it an offence to indulge in pastimes or amusements on the Lord's Day, if such are not in the nature of a game. Now, in Webster's Dictionary 'game' is defined as 'a contest according to certain rules for amusement or for winning a stake'. In Murray's Dictionary the following definition is given: 'A diversion of the nature of a contest, played according to rules, and displaying in the result the superiority, skill, strength or good fortune of the winner or winners.' It is true that both these authorities also give a wider meaning to the word, embracing amusements, delight, pastimes and sport of any kind, but if this wider interpretation were given to the word as used in the section, it would lead to a very far-reaching and intolerable interference with the liberty of the public. It would be improper to contend, in my opinion, that a person would be liable to prosecution under this section, who walked or ran in an open or public place, who rode along a road on a horse or bicycle, who sculled up a river in a boat, or who indulged in the gentle art of fishing on the Lord's Day, and yet in each of these cases such person may have been amusing himself according to his lights, and may indeed have been practicing or training for the purpose of playing a

game, at some future date, but he would not, in my opinion, be playing a game as contemplated by the words of the Ordinance."

Judge Kotze said (pp. 42, 43):

"The accused are charged with playing the game of golf. If it be held that a game is a contest of some kind, whether according to rule or not, then it cannot be played alone. *Such is certainly the ordinary meaning of a game*, and the Ordinance does not give any definition of the term showing that we must attach a different meaning to it. Once it be held that a game is a contest, then persons playing singly on different links or greens are not playing a game. According to the record, a Crown witness, on whose testimony the Crown relied, stated that the game of golf cannot be played by one person, but that there must be two or more sides. Consequently, upon the prosecution's own showing, and the rules of golf put in, each single and individual accused playing by himself was not playing the game of golf, as laid in the charge. I am aware that the most general definition, and in fact the etymological meaning of 'game' includes any sport, fun, frolic or pastime. But, as my brother Graham has remarked, if we accepted that meaning we should be going very far in curtailing the liberty of human beings." (Italics ours.)

While the Court here was construing a penal rather than a taxing statute, its remarks concerning the ordinary meaning of a game as a contest are none the less applicable to the circumstances in the instant case.

In *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, upon which the petitioner relies (Br., p. 11) the

decision was obviously based upon the fact that sweet milk chocolate was popularly regarded as "candy" and commercially sold as candy. In that case both the popular and commercial meaning coincided with the more general definition of the word "candy". In the case at bar, however, the popular and trade meaning of the word "game" is not the almost limitless definition upon which the petitioner relies, but the more restricted definition which was adopted by the Circuit Court of Appeals.

It is argued by petitioner (Br., p. 14) that the view of the Circuit Court of Appeals would eliminate the familiar "game" of solitaire from the class of games. This is by no means the case. The issue before the Court is the construction of a taxing act which may be described, somewhat loosely but adequately for this purpose, as imposing a tax upon the tangible articles embraced within its scope. "Solitaire" is not an article or instrumentality used in the playing of a game. Solitaire is a game, it is true, which one person can play alone, but the playing cards which are employed are obviously manufactured and primarily adapted to use in games of contest. The game of solitaire is a method of use of a gaming instrumentality; the issue before this Court is whether jig saw picture puzzles are articles or instrumentalities designed for and used in the playing of a game. Moreover, it is generally recognized that solitaire is an exception to the usual rule. Webster's definition of it as "a game which one person can play alone" carries with it the inference that the word "game", as usually understood, requires play between two or more persons. Aside from the absence of a tangible opponent, although solitaire is frequently played between persons or sides, in every other respect it partakes of

the nature of a game since it has distinct rules of play, a method of scoring and an uncertain outcome. These elements are lacking in the case of the jig saw picture puzzle.

III. TESTED BY THE RULE OF PRIMARY USE OR ADAPTATION, A PICTURE PUZZLE OF THE JIG SAW TYPE IS NOT A GAME.

The petitioner's contention that Section 609 imposes a tax upon every article designed to furnish sport, recreation or amusement is founded upon a patent fallacy, reminiscent of the familiar example of *non sequitur:* "All horses are four-legged animals, therefore all four-legged animals are horses." Because in one of the definitions of the word "game" it is defined as an "amusement or diversion", it does not follow that all amusements and diversions are "games". The sign of equality does not always import definitive limits which coincide. In the case at bar the petitioner's definition confuses the outer bounds of the *genus* with the narrow confines of the *species.*

This Court has laid down a test of taxability, in connection with the excise tax on other articles, which should govern in determining what falls within and what without the application of Section 609. That is the test of *primary use or adaptation.*

> *Universal Battery Co.* v. *United States,* 281 U. S. 580.

In this case, the Court said, in construing Section 900 of the Revenue Acts of 1918 and 1921, imposing a tax upon "automobile parts and accessories" (pp. 583, 584):

> "The administrative regulations issued under section 900 uniformly have construed the term 'part'

in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use but is *primarily adapted for use* as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is *primarily adapted for such use,* whether or not essential to the operation of the vehicle.

"This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. . . . We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles *primarily adapted for use* in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted." (Italics ours.)

This rule has also been followed by the Commissioner in Regulations 46 under the Revenue Act of 1932. By Article 53 the tax is held applicable to the articles enumerated in Section 609 and "to all similar articles *commonly or commercially known* as sporting goods, games, and parts of games . . ." (Italics ours.) The test of primary use and adaptation was expressly incorporated by the Commissioner into the definition of "sporting goods" in the Regulations and has been sub-

sequently applied by him in various sales tax rulings under these Regulations.[2] His enumeration in Article 55 of articles illustrative of the things taxable as games is limited to articles *primarily designed for and adapted to* use in games of contest. No mention is made anywhere in the Regulations of the jig saw picture puzzle or any other type of puzzle as being taxable under the statute. With respect to the articles held to be non-taxable under Article 56—gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars—none of them is primarily intended for and adapted to use in sport or games. Yet,—and this, it is submitted, is of no little significance,—all of them are capable of use in competition among contestants or in "competition against time" and all of them are designed to furnish "sport, recreation or amusement". By what process of reasoning can the exemption of these items and the inclusion of jig saw picture puzzles into the category of "games" be reconciled or defended?

Respondent readily admits two things about the jig saw picture puzzle, both of which are obvious: first, that it is one form of recreation, amusement or diversion, and second, that it can be adapted to use in a contest. He contends, however, that Congress, in imposing a tax upon "games and parts of games", intended to reach only such articles as are primarily intended for

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[2] See, for example, S. T. 835, XV-1 Cumulative Bulletin 396, where it was held that shoes which are readily usable for general outdoor wear and not especially designed for use in sports are not subject to the tax imposed by Section 609: S. T. 852, XV-2 Cumulative Bulletin 341, in which it was held that any article of clothing designed, intended, or specially adapted for use in the playing of a game or sport as distinguished from an article of clothing of general wear with only a possible or incidental use in playing a game or sport, is taxable as a uniform under Section 609. See also S. T. 542, XI-2 Cumulative Bulletin 480.

and adapted to use by two or more persons in playing a game as defined in the fourth dictionary definition referred to above, namely, games of contest. This definition of a "game" as a contest makes specific reference to articles such as dice, chess, billiards, baseball, football, tennis, etc., all of which are expressly mentioned in Section 609. It seems apparent, as the Circuit Court of Appeals held (R. 62), that aside from the articles such as skates, skis, fishing rods and reels, etc., which have no relation to games and are taxed as "sporting goods" *per se,* the underlying thought was to reach articles which are used in games of contest, whether physical or mental. The language of Section 609, when construed as a whole, discloses that Congress had in mind games of contest rather than every article or device which affords recreation, amusement or diversion. And it can not be disputed, on the record in this case, that the jig saw picture puzzles in controversy, like crossword puzzles, are primarily designed, adapted and intended for the amusement of one person alone, the individual who solves them.

The Circuit Court of Appeals correctly ruled that jig saw picture puzzles are not designed for use in games of contest and that the putting together of a jig saw picture puzzle involves no competition and only one participant (R. 60). An examination of the puzzles in evidence (Plff's Ex. 2) shows unquestionably that they were manufactured and primarily designed and adapted for the use and amusement of the individual.

Unless this test of taxability is adhered to there would be no safe standard or guide for the taxpayer to follow. The distinction which has been drawn is between possible use and intended use. It is, for example, possible to use an ordinary rope in a tug-of-war, yet no argu-

ment would be countenanced that because the rope is susceptible of such use it is taxable as a "game" under Section 609. It is possible for two people to match speed in drinking a beverage yet the adaptation of the beverage to the purpose of the occasion would not make it a device taxable as a "game". In the familiar pie-eating contest there is the gaming element of competition with victory for one of the contestants, yet that does not rended taxable as "games" the pies which are used in the contest. It seems unnecessary to multiply these illustrations. Under the adjudicated decisions and upon the record in this case it is submitted that only such articles are taxable as "games" as are manufactured for that purpose and that, since the jig saw picture puzzles in controversy were *not primarily designed for use in games of contest,* they were not intended to be taxed under the provisions of Section 609.

IV. PETITIONER'S CONTENTION THAT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE GENERAL FINDING OF THE TRIAL COURT IS WITHOUT FOUNDATION.

On the record in this case there can be no question that the decision of the Circuit Court of Appeals reversing the judgment of the District Court was a proper exercise of appellate jurisdiction to review. While the rule is well settled that an Appellate Court may review only such errors in law as are presented by the record, it is equally well settled that the appellate tribunal may consider the question whether, upon all the evidence, the judgment of the trial court is correct as a matter of law, where this question is preserved by the record.

In the instant case the plaintiff filed a motion for judgment at the conclusion of the trial (R. 8) and duly

saved his exception to its denial (R. 49). He also filed requests for rulings of law (R. 42–44) and duly saved his exception to the ruling of the Court denying such of the requests as were inconsistent with the opinion of the trial court (R. 49). Exception was also taken to the refusal of the trial court to grant the plaintiff's request for a specific ruling upon each of the plaintiff's requests for rulings of law (R. 50) and to the granting of the defendant's request for a ruling of law (R. 8, 49). Error was assigned as to all of these rulings (R. 53, 54).

This being the state of the record, the Circuit Court of Appeals clearly had jurisdiction to determine whether, upon all the evidence, the defendant was entitled to judgment as a matter of law.

Maryland Casualty Co. v. *Jones,* 279 U. S. 792, 795, 796, 49 S. Ct. 484, 73 L. Ed. 960.

City of St. Louis v. *Western Union Tel. Co.,* 148 U. S. 92, 96, 13 S. Ct. 485, 37 L. Ed. 306.

Fleischman Co. v. *United States,* 270 U. S. 349, 354, 46 S. Ct. 284, 287, 70 L. Ed. 624.

Harvey Co. v. *Malley,* 288 U. S. 412, 53 S. Ct. 426, 77 L. Ed. 866.

Eastman Kodak Co. v. *Gray,* 292 U. S. 332, 54 S. Ct. 722, 78 L. Ed. 1291.

Shepleigh v. *Mier,* 299 U. S. 468, 469, 57 S. Ct. 261, 81 L. Ed. 237.

See also

Armstrong v. *Metropolitan Life Ins. Co.,* 85 F. (2d) 185, 186 (C. C. A. 8, 1936).

Real Estate-Land Title & Trust Co. v. *Town of Fairfax,* 84 F. (2d) 675 (C. C. A. 10, 1936).

Pierce v. *Wyatt,* 83 F. (2d) 892 (C. C. A. 8, 1936).

Chesapeake & O. Ry. Co. v. *Indiana Fibre Products Co.*, 75 F. (2d) 193 (C. C. A. 7, 1935).

Willcuts v. *Stoltze*, 73 F. (2d) 868 (C. C. A. 8, 1934).

It is asserted by petitioner that the record discloses substantial evidence to establish the fact that jig saw picture puzzles are "games" under the construction adopted by the Circuit Court of Appeals and that it was therefore error to reverse the general finding. How utterly tenuous is this contention is apparent upon analysis of the so-called evidence upon which petitioner relies.

While it is true that during the time of the so-called picture puzzle craze neighbors and friends met together (R. 30, 36, 37), this does not establish the fact of competition or contest among them. If anything, it shows *co-operation* rather than competition in the solution of the puzzle. There is no evidence in this record of any competition or contest among them, or that jig saw puzzles are adapted to and widely used in competitive play.

Reliance is also placed upon the argument that there is "competition against time" in the solution of these puzzles. This is based upon the statement of a witness, in answer to a question from the Court (R. 31), that "the only competition there *could* be on the jig saw would be the relative time required by one to put them together . . ." Apparently the view is taken that the person solving a jig saw picture puzzle sits across the table in competition with a phantom opponent "Father Time". The witness was obviously not testifying to the existence of competition as a fact in the solution of these

puzzles. Indeed he went on to say (R. 31): ". . . but there are no rules. Everyone goes at it by their own methods." This fact is conclusively shown on the record and it cannot be brushed aside by the fanciful argument that the effort to complete the picture and to complete it in the shortest possible time constitute "rules of the game".

It is argued (Br., p. 13) that the exhibits disclose that they are games played according to rules. This argument is without foundation in the record and is clearly contradicted by the testimony in the record (R. 16, 26, 31). Moreover, whatever value such puzzles may have in developing mental faculties or the quality of patience, this certainly would not establish their character as a game.

The only evidence introduced by petitioner was two letters (Deft's Exs. A and B, R. 38, 40) containing inconsistent rulings of the Commissioner on the taxability of jig saw puzzles. No evidence was introduced to contradict the overwhelming testimony that jig saw picture puzzles are not in fact games in the terminology of the trade.

It is accordingly submitted that even if the general finding of the trial court should be treated as a pure finding of fact, that the jig saw picture puzzles in controversy are games, the record fails to disclose any substantial evidence or even a scintilla of evidence to support it. The general finding, however, was not a pure finding of fact. The opinion of the trial court (R. 10) clearly shows that it was based upon an erroneous construction of Section 609 which made it applicable to every contrivance designed to furnish sport, recreation, amusement or diversion. The puzzles in controversy were not found to be games as a fact, but were held to

be taxable under the broad construction of the phrase "games and parts of games" which was adopted by the trial court. The general finding was therefore not a pure finding of fact but rather a mixed conclusion of law and fact which was properly reversible if based upon an erroneous construction of the statute.

The argument of the petitoner that the articles in question are games because of their possible use in competition is, it is submitted, of little force. Of course it is possible to use jig saw picture puzzles in a contest, just as almost any article which is not a game as such could be adapted to such use. If the element of possible competition or "competition against time" were the test of a game, however, the word would obviously embrace many articles which are clearly not taxable under Section 609. The stories and articles in the magazine "Liberty" have a stated reading time but this does not make the magazine, story, or article taxable as a game. Competition against time exists in every field of human endeavor and the fact that it applies as well to non-taxable as to taxable articles destroys its validity as a rule for determining the taxability of jig saw picture puzzles. To found a tax on jig saw picture puzzles on such an unsubstantial basis would be to torture the language of the statute in order to bring within its application an article which by every rule of statutory construction was not intended to be taxed. Unless the rule of primary use or adaptation is adhered to—which rule the Commissioner himself has followed in Regulations 46 and in construing other portions of the statute—his power to determine what subjects are taxable as games would exceed all reasonable bounds.

The evidence in this record (R. 31) shows that there are no rules to cross word puzzles and that the object in

cross word puzles is to see who can do them the fastest, yet cross word puzzles are not and never have been taxed as games under Section 609, although they are quite similar to the jig saw picture puzzle. This Court may take judicial notice of the fact that there is no published ruling or regulation taxing cross word puzzles. As a matter of fact there is an unreported ruling that cross word puzzles are not taxable as "games" (R. 18). This statement was made by counsel for the plaintiff at the trial and was not denied by counsel for the defendant, nor was it denied when counsel for the defendant was called upon to produce this ruling (R. 19). Respondent feels warranted, therefore, in arguing that the accuracy of this statement is admitted and that the existence of this ruling is a fact of record. How then can it be urged that the jig saw picture puzzle is a game because of "competition against time" when there is evidence in the record that there is "competition against time" in cross word puzles (R. 31) and yet these puzzles are not taxed as "games" (R. 18, 19)? There is no evidence, on the other hand, that the time factor was of any importance in connection with the jig saw picture puzzles in controversy and the puzzles themselves, which are an original exhibit in this case (Plff's Ex. 2, R. 25) show that no standard of time was set or stated by the company for the solution of these puzzles.

The obvious unfairness and inconsistency of the Commissioner in imposing a tax on jig saw picture puzzles and exempting cross word puzzles from taxation reveals the untenable nature of the petitioner's argument in so far as it is based on the element of competition against time.

The question may be asked, why should Congress differentiate between games and puzzles and tax the one

and not the other? This question is best answered by asking another. Is there any reason why Congress should not tax fishing tackle or gymnasium equipment, punching bags, dumb-bells, parallel bars, etc., which are just as much articles of recreation and amusement as jig saw puzzles? The mere fact that Congress might have taxed puzzles is no reason for writing into the statute a word which is not there. In the *Monroe Cider, Vinegar & Fruit Co. case, supra,* the Court refused to do this very thing. Taxation by implication is not favored.

United States v. *Goldenberg,* 168 U. S. 95, 102.
In re Flatbush Gum Co., 73 F. (2d) 283; aff'g. 6 F. Supp. 909; Cert. den. *People of State of New York* v. *Arnold,* 294 U. S. 713.
Smietanka v. *First Trust & Savings Bank,* 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391.
Gould v. *Gould,* 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211.
Reinecke v. *Gardner,* 277 U. S. 239, 48 S. Ct. 472, 473, 72 L. Ed. 866.
Iselin v. *United States,* 270 U. S. 245.

In *United States* v. *Goldenberg, supra,* this Court said (p. 102):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise when there are cogent reasons for believing that

> the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Even if the failure to tax is inequitable this should not be considered in construing the statute. *Converse* v. *Northern Pac. Ry. Co.,* 2 F. (2d) 959. In the case at bar, however, every equity is in favor of the respondent. There can be no justification for the imposition by the Commissioner, on the basis of a mere administrative ruling, of a tax on manufacturers of jig saw picture puzzles to the exclusion of manfacturers of other types of puzzles and other types of non-competitive amusement devices. There is no published ruling or regulation taxing any other type of puzzle as a game. It is therefore submitted that the ruling of the Commissioner in S. T. 567 violates the sense of fairness by which we must assume Congress was guided in the enactment of this statute.

It would have been a simple matter for Congress to use the word "puzzles" if it had intended to tax puzzles. Moreover, if it were the intent of Congress to tax all kinds of amusement devices, including jig saw puzzles, it could have used the words "amusement devices" or some other apt phrase to express its intention. If Congress wishes to tax "puzzles" all that is necessary is to amend the law and supply the omission in the statute. Every consideration of fact and of logic supports the respondent's contention that it was not the intent of Congress to tax jig saw picture puzzles as "games".

As this Court said in *Iselin* v. *United States, supra,* at page 251:

> "What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

In the case at bar the omission of jig saw picture puzzles was intentional rather than by inadvertence and accordingly the case is stronger in calling for a refusal to supply an omission in the statute or to extend its scope by implication.

While the question has never been judicially determined whether or not a picture puzzle of the jig saw type is a game, there is ample precedent to support the respondent's position in the case at bar in analogous situations which have come to the attention of the courts.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan*, 280 Fed. 624 (C. C. A. 2, 1922).

Casey v. *Sterling Cider Co.*, 294 Fed. 426 (C. C. A. 1, 1923).

In Monroe Cider, Vinegar & Fruit Co. v. *Riordan, supra,*[3] the question was whether sweet cider was included in the classification "other soft drinks" under the provisions of Section 628 of the Revenue Act of 1918, section (a), which, in part, imposed a tax—

"Upon all unfermented grape juice, ginger ale,

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[3] Cited and followed in *Phez Co.* v. *United States*, 25 F. (2d) 1011, 1012 (D. C., D. Ore. 1927), aff'd, *United States* v. *Phez Co.*, 28 F. (2d) 106, 107 (C. C. A. 9, 1928); *Inland Products Co.* v. *Blair*, 31 F. (2d) 867, 868 (C. C. A. 4, 1929); *Casey* v. *Sterling Cider Co., supra; Douglas* v. *Edwards*, 298 F. 229, 238 (C. C. A. 2, 1924); *United States* v. *Tod*, 297 F. 172, 174 (C. C. A. 2, 1924); *Salembier & Villate, Inc.* v. *McElligott*, 14 F. (2d) 984, 985 (D. C., S. D. N. Y. 1926).

root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and *other soft drinks*, sold by the manufacturer", etc.

Circuit Judge Mayer, who delivered the opinion of the Court, said (p. 626):

"If this case were to be decided by the dictionary definition of 'soft drink', then unquestionably sweet cider would be included; for according, for instance, to the Century Dictionary, 'soft drink' is 'any drink that is non-alcoholic, as lemonades, ginger ale, tea' etc. 'Cider', according to the dictionaries, was 'formerly any liquor made of the juice of fruits; now the expressed juice of apples either before or after fermentation.' 'Hard cider' is 'fermented cider.' 'Sweet cider' is 'cider before fermentation or cider in which fermentation has been prevented.'

"It is agreed by the parties, and it is a matter of common knowledge, that 'sweet cider' is a non-alcoholic beverage, and therefore, within the dictionary definition *supra*, is a soft drink, just as tea is a soft drink in the sense of a non-alcoholic beverage. If, therefore, Congress had intended that every non-alcoholic beverage should be taxed under section 628 *supra*, it would have been easy to frame a statute which would have read merely that there shall be levied, assessed, collected, and paid certain taxes upon "all soft drinks' or upon all drinks, whether fermented or unfermented, containing less than one-half of 1 per cent. of alcohol.

"It is a familiar rule of statutory construction that the legislative body is not presumed to use meaningless language, or, putting the rule another

way, that in ascertaining the legislative intent due consideration and weight shall be given to the words and phrases of a statute.

"The inquiry immediately suggests itself: In mentioning such well known drinks as ginger ale, root beer, and others why did Congress omit 'sweet cider' when it is probably the oldest non-alcoholic beverage of all the list set forth in section 628? The answer is to be found in the history of the legislation as illuminating the phraseological structure of the statute and in ascertaining the position of 'cider' in common knowledge and in the English language."

And Judge Mayer concluded his opinion (p. 634) in the following language:

"We are fully satisfied that sweet cider is not subject to the tax, but, in any event, it is plain that in this instance Congress has not expressed its intention to tax sweet cider in that clear and unambiguous language which must be present before it should be held that a particular article of commerce is subject to a tax statute which does not name it specifically and comprehends it only if a meaning be given to the term 'other soft drinks' which neither the history nor the structure of the statute justifies."

It is accordingly submitted that the definition of "game" adopted by the Commissioner of Internal Revenue in Article 53 of Regulations 46 and the ruling in S. T. 567 that jig saw puzzles containing more than 50 pieces are taxable as "games", are beyond the scope of the statute and constitute an improper exercise of legislative power by an administrative official.

Morrill v. *Jones,* 106 U. S. 466, 467, 1 S. Ct. 423, 27 L. Ed. 267.

United States v. *United Verde Copper Co.,* 196 U. S. 207, 214, 215, 25 S. Ct. 222, 49 L. Ed. 449.

Where a word is used by Congress which is susceptible of two interpretations, one of which, although an accepted definition of the term, would lead to absurd consequences, it is submitted that the other interpretation should be adopted, especially where the latter definition is well established and more nearly in accord with the popular conception of the term and its meaning in the trade.

The absurdity of the definition of "game" as "every contrivance, device or combination of articles which is designed to furnish sport, recreation or amusement" is patent. There are many things besides "jig saw picture puzzles" which furnish sport, recreation, amusement or diversion, such as books, magazines, horses, automobiles, radios, phonographs, violins, pianos and other musical instruments, cameras, motion picture machines and films, bicycles, fishing tackle, yachts, sailboats, the tools or instrumentalities used in wood carving, modelling, or gardening, toys, such as microscopic outfits, magic material sets, railroad tracks and cars, paint, erector and skyscraper sets, building blocks, chemical, electrical and tool sets, etc. No one would call these articles "games" and they are obviously not taxable as games. Even the articles which are expressly exempted from taxation as sporting goods or games under Regulations 46, Article 56 (*supra,* p. 5), are designed to furnish sport, recreation, amusement or diversion. If the test of taxability of games and parts

of games under Section 609 is whether the article is designed to furnish sport, recreation, amusement or diversion, there is no logical basis for differentiation between the articles specified in Regulations 46, Article 56, the other articles herein mentioned and the many other types of puzzles on the one hand, and jig saw picture puzzles on the other. It is quite apparent from the foregoing illustrations that while all games furnish amusement, recreation or diversion, all articles which furnish amusement, recreation or diversion are not necessarily games.

The contention of the respondent that the definition of the word "game" adopted by the Commissioner is too broad finds judicial support in the leading case of *Illfelder* v. *United States*, T. D. 31115, 19 T. D. 59, where it was held that the "sparkler", although intended mainly for the amusement of children, was not dutiable as a toy. Here the following rule of classification was laid down for purposes of the Tariff Act (p. 60):

> ". . . While some of the dictionaries and even some of the decisions define a toy to be any article *used* by children for their amusement, a thing the *main purpose or use* of which is the amusement of children, any article *primarily intended* for the entertainment and amusement of children, we can not admit that these definitions accurately or correctly define a toy as commonly or generally understood, including as they do many things not popularly recognized as toys. Manifestly such definitions are altogether too broad and are open to the very serious charge of inexactness. In fact, failing utterly to so describe a toy as to distinguish it from other things, and especially from things which are

not toys though serving to amuse children, they are wanting in the essentials of definition and are definitions only in name.

"A toy is a thing to amuse children, but it does not follow that everything which amuses children or which enters into a device for their amusement is itself a toy. *Wanamaker* v. *Cooper* (69 Fed. Rep., 465); *Thanhauser* v. *United States* (159 Fed. Rep., 228)."

In that case it was contended that because toys afford amusement to children, the sparkler was a toy, since it afforded amusement to children.

The fallacy of this argument was immediately perceived by the Court. It is the same fallacy which the petitioner is committing in the case at bar. No more is every article designed to furnish sport, recreation or amusement a "game" than is every article designed to amuse children a "toy".

Thus it is submitted that while one of the dictionary definitions of the word "game" is "an amusement or diversion", it was the intent of Congress to use the word in the more generally accepted sense of the fourth definition already referred to. Indeed the case at bar is a stronger one for disregarding the definition contended for by the petitioner than the soft drink cases, since in those cases the dictionary definition was completely ruled out, while in the case at bar the question is merely which one of two definitions is more nearly accurate as disclosing the intent of Congress.

It is therefore submitted that the ruling of the Circuit Court of Appeals that "as generally understood a 'game' involves a sport or diversion in which two or more persons contest" and "the word 'game' in the

phrase here under consideration means the same", is the correct interpretation and definition of the word "game" as used in Section 609.

The petitioner relies upon certain decisions of the Court of Customs and Patent Appeals which have no possible bearing upon the question here presented.

United States v. *Louis Wolf & Co.*, T. D. 43719, 56 T. D. 605 (U. S. Ct. Cust. Appls. 1929).

John Wanamaker v. *United States*, T. D. 43674, 56 T. D. 468.

In the former case it was held that certain children's games and a simple childish puzzle "akin to" a simple jig saw puzzle were dutiable as toys and not as manufactures of paper. Unquestionably the Court made a proper choice of classification. It said (p. 610):

> "We do not mean to say that all games with which children play are toys, but in this decision we mean to hold that the simple toys under consideration here, although they involve the element of a game, are not such as should be denied toy classification."

In the latter case it was held that jig saw puzzles of about 250 pieces were not dutiable as toys but as manufactures of paper. Here the evidence established the fact that these puzzles were designed for adult use. While this took them out of the category of "toys", however, it did not put them into the category of games.

Neither of these cases is any authority to sustain the petitioner's contention that the articles in controversy were taxable as games under Section 609. They are utterly inapplicable to the facts in the case at bar, which clearly establish a definite line of demarcation between

games, toys and puzzles as separate and distinct categories of amusement devices (R. 15, 24).

It is apparently argued (Br., pp. 20, 21) that all games are classified as toys under the Tariff Act, if designed for children. This is not always the case, however, since it has not only been held that certain types of children's games are dutiable as toys, but that some games which are designed for children are not dutiable as toys:

> *United States* v. *Field,* T. D. 40738, 47 T. D. 292 (U. S. Ct. Cust. Appls., 1925).
>
> *United States* v. *Strauss,* T. D. 41025, 48 T. D. 29.

There is accordingly no authoritative basis for the petitioner's assertion (Br., pp. 20, 21) that "jig saw puzzles, *like other games* . . . are classified as toys if designed for children". (Italics ours.) Nor is there any justification for the statement (Br., p. 19, 20) that all toys could be included in the term "games". The word "toys" appearing in the exception clause in the statute was obviously inserted out of abundance of caution.

V. UNDER THE DOCTRINES EJUSDEM GENERIS AND NOSCITUR A SOCIIS THE JIG SAW PICTURE PUZZLES MANUFACTURED BY THE VIKING COMPANY WERE NOT SUBJECT TO TAX.

Section 609 imposes a tax upon "chess and checker boards and pieces, dice, games and parts of games". It is submitted that under the well established rule by which words of general meaning take their character from words of specific meaning which precede them, the games intended to be taxed by Congress were games similar to chess, checkers and dice, all of which involve

a contest between two or more persons or sides according to a set of rules and in which the result is always uncertain.

The doctrine *ejusdem generis* is that where special words are used which are followed by words of more general import, the general words are limited to things of the same kind.

United States v. *Nichols,* 186 U. S. 298, 300.

Under this doctrine and the closely related doctrine *noscitur a sociis,* by which the meaning of doubtful words is ascertained by reference to the meaning of associated words, the conclusion seems inescapable that Congress had in mind only such games as involved a contest between two or more persons according to a set of rules. This doctrine has been frequently applied in determining the intent of Congress.

United States v. *Baumgartner,* 259 Fed. 722.
Phez Co. v. *United States,* 25 F. (2d) 1011, (D. C., D. Ore. 1927), aff'd *United States* v. *Phez Co.,* 28 F. (2d) 106 (C. C. A. 9, 1928).

In the *Phez Co. case, supra,* the question was whether the product "Lo-ju" was taxable as a soft drink under Section 628 of the Revenue Act of 1918. The District Court said (p. 1012):

> "It seems to me, however, that, as indicated by the *Monroe Cider* and *Casey cases, supra,* soft drink as used by the statute is not to be given such a general and broad meaning, but is to be interpreted with reference to the class of products with which it is associated. *It follows in the statute words of particular and specific meaning, and should not be construed in the broader sense, but as*

applied to products of similar general class to those specifically mentioned. O'Neill v. *Odd Fellows,* 89 Or. 382, 174 P. 148; *Virginia* v. *Tenn.,* 148 U. S. 519, 13 S. Ct. 728, 37 L. Ed. 537 . . ." (Italics ours.)

So in the opinion of the Circuit Court of Appeals, Circuit Judge Gilbert said (p. 107):

"In brief, we think it is clear that Congress, in enacting the Revenue Law of 1918, did not intend to classify unfermented grape juice as a soft drink, and that in employing the words 'and other soft drinks' the intention was to include all other artificial manufactured drinks of the same general nature as the soft drinks which had just been enumerated . . ."

The construction contended for by the respondent, namely, that a game is a contest, in accordance with the fourth dictionary definition hereinbefore referred to, was followed by the Commissioner in Article 55 of Regulations 46, which reads as follows:

"ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, pingpong sets, roulette wheels, backgammon sets, *etc.*"

The enumeration of the foregoing articles (which are all used in games of contest) as being taxable as games, is concrete evidence of the application of these doctrines by the Commissioner himself in defining the scope of the word "games". The abbreviation "etc." means, of course, "and others of the like kind" and is generally used when a number of members of a class have been specified, to indicate that more of the same sort might have been mentioned but for shortness are omitted.

Petitioner argues (Br., p. 18) that the doctrine *ejusdem generis* is inapplicable since the enumeration preceding the general phrase in the statute is "relatively slight". It should be observed that the specific enumeration of games of contest is by no means slight. The legislative history of the tax on games, moreover, shows that Congress itself was guided by this principle. The Report of the Senate Committee on Finance under the Revenue Act of 1917 states (*infra,* p. 44) that the tax applies to articles used in "certain amusement games, such as tennis rackets, . . . checker and chess boards, dice, etc. . . ." and to "certain like articles".

It is therefore submitted that Section 609, as tested by these rules of statutory construction, has no application to jig saw picture puzzles, which have no similarity either to "games" as a general class or to the particular games enumerated by Congress in that section, and that the decision and ruling of the Circuit Court of Appeals in the instant case, which was based in part upon the application of these well known doctrines *ejusdem generis* and *noscitur a sociis,* is correct.

VI. THE LEGISLATIVE HISTORY OF THE TAX ON "GAMES", AS CONTAINED IN THE REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS, DOES NOT DISCLOSE AN INTENT TO TAX "PUZZLES".

The construction of Section 609 which was adopted by the Circuit Court of Appeals finds ample support in the legislative history of the Revenue Acts which imposed a tax on games. The trial court said, in the course of its opinion (R. 12):

> "There is nowhere shown in the enactment an *intent to except* a game or puzzle such as is here involved . . ." (Italics ours.)

The usual judicial approach, however, is an endeavor to ascertain not whether an intention to exempt jig saw picture puzzles from taxation appears, but whether an intention to include them as subjects of taxation is disclosed from the language of the statute. In this connection the Congressional Committee Reports clearly reveal the affirmative presence of an intention on the part of Congress not to include picture puzzles within the scope of Section 609.

1. The tax on games first appeared in our revenue laws in section 600 of the Revenue Act of 1917, which was entitled: "An Act to provide revenue to defray war expenses, and for other purposes." Mr. Kitchin, of the House Committee on Ways and Means, in the report accompanying H. R. 4280 (Revenue Act of 1917), stated, with reference to the war excise taxes proposed under Title VI of that Act (Report of Committee on Ways and Means, No. 45, 65th Congress, 1st Session, 1917, Vol. I, Miscellaneous, No. 7252, p. 7):

> "This title proposes the levy of a tax equivalent to 5 per cent of the price for which sold by the manufacturer, producer, or importer of . . . athletic and sporting goods, including games . . .
>
> "It is estimated that the taxes levied in this title will yield during a 12-month period $118,750,000, distributed as follows: . . . Athletic goods, etc., $2,000,000 . . ."

It should be observed that the tax was referred to as a tax on "Athletic and sporting goods' including games" and that in estimating the yield, the subject matter of the tax was referred to as "athletic goods". This discloses an intention to tax articles involving the element of contest rather than every instrumentality

and device which furnishes recreation, amusement or diversion.

The Report of the Senate Committee on Finance to accompany H. R. 4280 (Report No. 103, 65th Congress, 1st Session, Vol 1, Miscellaneous, No. 7249) states, at page 1:

> "Your committee devoted more than 10 weeks to earnest and painstaking consideration of the bill. They spent nearly a week giving hearings. *These hearings were attended by representatives of nearly every interest affected* by any of the provisions of the bill. The printed hearings cover over 650 printed pages." (Italics ours.)

And at page 11:

> "TITLE VI. WAR EXCISE TAXES.
>
> "Your committee felt certain that articles used in *certain amusement games,* such as tennis rackets, billiard and pool balls, billiard and pool tables, checker and chess boards, dice, etc., should bear a moderate tax of this character, and acting upon this principle has retained the gross-sales tax imposed by the House bill *upon these and certain like articles,* but has reduced the rate of 5 percent of the House bill to 2 percent." (Italics ours.)

Is it not clear from this Report of the Senate Committee that the tax was limited to the specific articles enumerated? In view of the obvious need for revenue, it is difficult to understand why puzzles generally or jig saw picture puzzles in particular were not included, if it were at that time the intention of Congress to tax them, especially when it appears that jig saw picture puzzles have been a well known article of commerce for a period long prior to the Revenue Act of 1917.

2. It was not until the Revenue Act of 1918 that the catch-all phrase "and all similar articles commonly or commercially known as sporting goods" was added to cover articles similar to those particularized. The specific enumeration was more detailed than in Section 600 of the 1917 Act. In addition to the items there mentioned, the following articles were enumerated: Nets, racket covers and presses, skates, snow shoes, skis, toboggans, canoe paddles and cushions, polo mallets (baseball), gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basketball goals and uniforms.

Article 18 of Regulations 47, relating to excise taxes on sales by the manufacturer under Section 900 of the Revenue Act of 1918, contained a detailed illustrative description of articles not specifically mentioned which were taxable under the general phrase "and all similar articles commonly or commercially known as sporting goods". No mention was made of jig saw picture puzzles at *that* time although they were well known and in common use, nor was any attempt made in the Regulations to ascribe to the phrase "games and parts of games" the broad signification which was adopted by the Commissioner in his Regulations under the Revenue Act of 1932 and in the ruling S. T. 567, published more than five months after its passage.

3. In connection with H. R. 10236, which became the Revenue Act of 1932, it is interesting to note that the report of the House Committee (House Report No. 708, 72d Congress, 1st Session, No. 9492) recommended a general manufacturers' excise tax as a temporary measure, and in that connection stressed the importance of certainty as to tax liability. The Report states (p. 32):

> *"It is essential that the persons who will be called upon to make returns and pay the tax to the government must know, in advance of the sale, whether the sale is taxable* and the amount of the tax liability. Having ascertained the taxability of the sale and the basis upon which the amount of tax is to be computed, they must be able to rely upon the determination. Retroactive imposition of the tax, or change in the method by which the tax is computed, necessarily results in hardship and dissatisfaction, which in turn will bring about the breakdown of the tax." (Italics ours.)

The Senate Committee on Finance, in its Report accompanying H. R. 10236 (Report No. 665, 72d Congress, 1st Session, No. 9488) recommended elimination of some of the excise taxes contained in the House bill, including the tax on sporting goods (pp. 3, 11, 44). This provision, however, was retained, but by amendments No. 159, 160 and 161 in the Senate, to which the House at first objected and subsequently receded, the list of taxable articles was expanded to *include* tennis racket frames and strings and football uniforms, and to *exclude* canoe cushions and football goals. (See Conference Report to accompany H. R. 10236, Report No. 1492, 72d Congress, 1st Session, No. 9493.)

The specific exclusion of football goals from Section 609 of the Revenue Act of 1932 after their inclusion under Section 900 of the Revenue Act of 1918 would seem quite clearly to indicate an intention not to tax football goals, although they would be included under the catch-all phrase "and all similar articles commonly or commercially known as sporting goods". The respondent submits that this conference committee

report clearly shows that Congress intended to tax only such articles as were mentioned and that such articles as were eliminated were not intended to be taxed. Consistent with this view is the ruling of the Commissioner in S. T. 461 (XI-2 Cumulative Bulletin 479) in which he held that fishing tackle, such as nets, lines, hooks, baits, flies, etc. are not taxable under Section 609 because not mentioned, notwithstanding the fact that the statute applies to "fishing rods and reels . . . and all similar articles commonly or commercially known as sporting goods".

There is no warrant, therefore, in the legislative history of the tax on "games" for attributing to Congress an intent to embrace within the scope of Section 609 every article which might conceivably be known as "sporting goods" or "games", or every contrivance designed to furnish sport, recreation or amusement.

VII. IN THE LIGHT OF THE ADMINISTRATIVE PRACTICE AND INTERPRETATION UNDER PRIOR REVENUE LAWS, PICTURE PUZZLES OF THE JIG SAW TYPE ARE NOT TAXABLE AS "GAMES AND PARTS OF GAMES" UNDER SECTION 609 OF THE REVENUE ACT OF 1932.

The Revenue Acts of 1917 and 1918,[4] which were in effect for a period of more than four years, from Octo-

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[4] The provisions in those laws with respect to the tax on games are hereinafter set forth for comparison with Section 609 of the Revenue Act of 1932:

"REVENUE ACT OF 1917.

"SEC. 600 (f) Upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games,* except playing cards and children's toys and games, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold." (Italics ours.)

ber 4, 1917 to December 31, 1921, contained the same provision taxing "chess and checker boards and pieces, dice, games and parts of games" which appears in Section 609 of the 1932 Act. During this entire period jig saw picture puzzles, although they were a well known article of commerce, were not taxed as "games". Nor were they subjected to any tax under Section 609 of the 1932 Act, during the first five months of its operation. It was not until the ruling in S. T. 567, which was made on November 14, 1932, that the Commissioner of Internal Revenue adopted a construction of Section 609 under which jig saw picture puzzles were held by him to be taxable as "games".

It is also significant that, although there must be thousands of puzzles, there has never been a published ruling or regulation taxing any puzzle as a "game" other than the one here in controversy. And, as has already been pointed out, cross word puzzles were expressly ruled to be non-taxable as games.

Under these circumstances the respondent submits that the long-established administrative practice under these revenue laws is very persuasive to show that the phrase "games and parts of games" does not include jig saw picture puzzles, that being for a long time the construction or interpretation adopted by the executive

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"REVENUE ACT OF 1918.

"SEC. 900 (5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games* (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum." (Italics ours.)

department charged with the enforcement of the statute.

The law is well settled that when the meaning of a statute is doubtful, great weight will be given to the construction placed upon it by the department which is charged with its execution.

Robertson v. Downing, 127 U. S. 607.
United States v. *Hermanos,* 209 U. S. 337.
Komada & Co. v. *United States,* 215 U. S. 392.

It is likewise well settled that the re-enactment by Congress without change of a statute which has previously received a long-continued executive construction is an adoption by Congress of such construction.

United States v. *Falk,* 204 U. S. 143, 152.
Brewster v. *Gage,* 280 U. S. 327, 337, 50 S. Ct. 115, 74 L. Ed. 457.
National Lead Co. v. *United States,* 252 U. S. 140.
Edwards v. *Wabash Ry. Co.,* 264 Fed. 610.
Poe v. *Seaborn,* 282 U. S. 101, 106.
McCaughn v. *Hershey Chocolate Co.,* 283 U. S. 488, 492.
McFeely v. *Commissioner,* 296 U. S. 102, 108.

See also

Old Colony R. Co. v. *Commissioner,* 284 U. S. 552, 52 S. Ct. 211, 76 L. Ed. 484.
Minnesota Tea Co. v. *Commissioner,* 76 F. (2d) 797.
United States v. *Field,* 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617.
Smietanka v. *First Trust & Savings Bank,* 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391.

Schwab v. *Doyle,* 258 U.S. 529, 42 S. Ct. 391, 66 L. Ed. 747.

Douglas v. *Edwards,* 298 Fed. 229, 238 (C. C. A. 2, 1924).

In the instant case the provisions of the Revenue Acts of 1917 and 1918 imposing a tax on "games" were re-enacted without change and the administrative interpretation under which jig saw picture puzzles were not included within their application was of long duration. It is accordingly submitted that under this rule of statutory construction it was not the intention of Congress to subject picture puzzles of the jig saw type to taxation as "games".

The petitioner contends that the principle of prior administrative construction has no application to this case. It is said (Br., p. 9, Note 1) that the statement that "under the earlier Acts jig saw puzzles were manufactured and sold without being subject to the tax is founded solely upon an assertion of taxpayer's counsel in the course of a colloquy at the trial". No assertion is or can be made by the petitioner, however, that they were taxed under the prior Acts. Nor can it be argued that the absence of any ruling on the taxability of jig saw puzzles is of no consequence. The failure of the Commissioner to construe the prior Acts as being applicable to jig saw picture puzzles is the adoption by him of an administrative construction which is entitled to weight in determining the meaning of the identical phrase in the 1932 Act. There is no question on the record that such puzzles have been well known commercial articles almost since time immemorial.

VIII. IF THERE IS ANY DOUBT THAT THE PHRASE "GAMES AND PARTS OF GAMES" INCLUDES JIG SAW PICTURE PUZZLES, THIS DOUBT SHOULD BE RESOLVED AGAINST THE TAXING POWER AND IN FAVOR OF THE TAXPAYER.

The Circuit Court of Appeals said in its opinion (R. 62):

> "If there is a reasonable doubt as to the meaning of the Act, it should be construed most favorably to the taxpayer. *Gould* v. *Gould,* 245 U. S. 151. But we see no reason for resorting to that expedient here."

While there can be no doubt on this record, and under the applicable authorities, that Congress did not intend to tax jig saw picture puzzles as games, if any vestige of doubt remains to be dispelled the case would call for the application of the well known rule of doubt.

The fact alone that the word "game" has seventeen dictionary definitions is sufficient to raise the question whether the word is not too vague, equivocal, indefinite and ambiguous to be made the basis for imposing a tax on jig saw picture puzzles. The only basis upon which the tax in controversy could be justified is by attributing to Congress an intent to tax as games every contrivance or device designed to furnish "sport, recreation or amusement". This construction, however, as has been shown above, would lead to absurd consequences. It would override and ignore the distinction between a game and a puzzle which persists in common usage and in the terminology of the trade. It would disregard the legislative history of the tax on games which indicates that the intention was to tax as "games" and "sporting goods" only those articles specifically men-

tioned and all similar articles under the doctrines *ejusdem generis* and *noscitur a sociis*. All these considerations, even assuming that they do not establish the unmistakable intention of Congress, are more than sufficient to require the resolution of any doubts which they may create in favor of the respondent.

Particularly is this true in view of the doubts which existed in the mind of the Commissioner himself. During the period of more than four years in which the Revenue Acts of 1917 and 1918 were effective, he did not consider jig saw picture puzzles to be taxable as "games". Nor did the trade generally know of the imposition of such a tax until the ruling in S. T. 567 in November of 1932. On August 26, 1932 the Commissioner expressly ruled that jig saw puzzles were not taxable as "games" under Section 609 (Plff's Ex. 1, R. 20). On November 14, 1932, in S. T. 567, he ruled that jig saw puzzles containing more than 50 pieces were taxable. On February 7, 1933 he ruled that they were taxable from that date (Deft's Ex. A, R. 39), although, if they were taxable under Section 609 they would have been taxable from the effective date of the Act, which was June 21, 1932. It must have been the realization of this inconsistency which led the Commissioner to rule on April 20, 1933 (Deft's Ex. B, R. 40) that the tax on jig saw or picture puzzles was effective not from February 7, 1933 or November of 1932 but from the effective date of the Revenue Act of 1932.

In view of this confusion and vacillation on the part of the Commissioner; in view of the legislative history of the tax on games; in view of the prior administrative construction of language identical with that used in Section 609; in view of the overwhelming evidence in

the record that "games" do not include "puzzles" in the terminology of the trade; in view of the fact that there are three separate and distinct types or categories of amusement devices, namely, games, puzzles and toys; in view of the fact that cross word puzzles were ruled to be non-taxable as games; in view of the fact that under the definition of game adopted by the Commissioner in Article 53 of Regulations 46 all of the articles enumerated in Article 56 of said Regulations, namely, gymnasium equipment, rowing machines, punching bags, dumb-bells, parallel bars, etc. would be just as much subject to tax as articles "designed to furnish sport, recreation or amusement" as would jig saw picture puzzles; in view of the fact that no other form or type of puzzle has been held to be taxable as games by any published regulation or ruling; and in view of the fact that the definition for which the petitioner contends would lead to absurd results in that it would render taxable not only the many articles which the Commissioner himself has ruled to be non-taxable but innumerable articles which by no stretch of the imagination could be considered games; it is respectfully submitted that, if resort must be had to the rule of doubt, that construction should be adopted which is most strongly against the government and in favor of the citizen.

Gould v. *Gould,* 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211.

Eidman v. *Martinez,* 184 U. S. 578, 583, 22 S. Ct. 515, 46 L. Ed. 697.

United States v. *Merriam,* 263 U. S. 179, 44 S. Ct. 69, 68 L. Ed. 240.

United States v. *Field,* 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan,* 280 Fed. 624.

Smietanka v. *First Trust & Savings Bank, supra*

Crooks v. *Harrelson,* 282 U. S. 55.

Skinner v. *United States,* 8 F. Supp. 999 (D. C., S. D. Ohio, W. D. 1934).

Iselin v. *United States,* 270 U. S. 245.

In *Gould* v. *Gould, supra,* this Court held that alimony paid to a divorced wife under a decree of court was not taxable income under the income tax act of 1913. Mr. Justice McReynolds, who delivered the opinion of the Court, said (p. 153):

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth,* 2 Story, 369; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468, 474; *Benziger* v. *United States,* 192 U. S. 38, 55."

In the case of *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan, supra,* it was said (p. 634):

> "We are fully satisfied that sweet cider is not subject to the tax, but, in any event, it is plain that in this instance Congress has not expressed its intention to tax sweet cider in that clear and unambiguous language which must be present before it should be held that a particular article of commerce

is subject to a tax statute *which does not name it specifically* and comprehends it only if a meaning be given to the term 'other soft drinks' which neither the history nor the structure of the statute justifies." (Italics ours.)

So in the case of *Crooks* v. *Harrelson, supra,* this Court said (p. 61):

"Finally, the fact must not be overlooked that we are here concerned with a taxing Act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam,* 263 U. S. 179, 187–188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used', we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General,* L. R. 4, H. L., 100, 122, that 'if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' "

IX. THE COMMISSIONER'S RULING IN S. T. 567, SUBJECTING JIG SAW AND PICTURE PUZZLES OF MORE THAN 50 PIECES TO TAX AS "GAMES" UNDER SECTION 609 OF THE 1932 ACT, IS AN ARBITRARY, UNREASONABLE AND DISCRIMINATORY CLASSIFICATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The uncontradicted evidence in the record convincingly demonstrates how untenable is the position taken by the Commissioner in S. T. 567. This ruling is not founded in common sense. The difficulty of a jig saw puzzle does not depend upon the number of pieces it contains. This is only one of many factors to be taken into account. Other factors are the size of the pieces, the shape of the cuts, the type of coloring, and finally, the type of picture. There is abundant evidence in the record to this effect (R. 16, 32, 36). The record also discloses that in the opinion of the plaintiff's expert witnesses children are at least as adept as adults and sometimes rather smarter than their parents in solving jig saw puzzles, that children can solve puzzles in excess of 50 pieces and that even the 162-piece Viking puzzle was too easy for children (R. 16, 26, 27, 30, 36). The mere statement that under the Commissioner's ruling a simple picture puzzle containing 51 pieces would be taxable while a more difficult puzzle of 50 pieces or less would be exempt from taxation seems sufficient to demonstrate the arbitrary and unreasonable character of this ruling.

On this state of the evidence, it is submitted that there is no basis in reason for the arbitrary and discriminatory ruling made by the Commissioner and applied to this taxpayer in the classification of taxable and non-

taxable articles. Congress itself has been held to the rule of reason.

Nicol v. *Ames,* 173 U. S. 509.
Smyth v. *Ames,* 169 U. S. 466.
Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 401.
Near v. *Minnesota,* 283 U. S. 697.
Brushaber v. *Union Pacific R. R.,* 240 U. S. 1, 24, 25
Stebbins v. *Riley,* 268 U. S. 137.
Diamond Shoe Co. v. *Commissioner,* 42 F. (2d) 144.
Frew v. *Bowers,* 12 F. (2d) 625, 630.

It is now well settled, since the decision in the *Brushaber case, supra,* that the due process clause of the Fifth Amendment is a limitation on the taxing power of Congress where "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was *so wanting in basis for classification* as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." (Italics ours.)

Were there not some such limitation upon the Federal taxing power it would result in a situation where, to use the language of Judge Learned Hand in the case of *Frew* v. *Bowers, supra,* (p. 630):

> "Taxpayers may be selected by lot and assessments may vary with the price of wheat."

In *Stebbins* v. *Riley, supra,* Mr. Justice Stone, speaking for this Court, enunciated the following rule of classification (p. 142):

> "The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, *and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation.*" (Italics ours.)

In *Nicol* v. *Ames, supra,* this Court held that a Federal tax on sales at a Board of Trade or Exchange did not violate the uniformity requirement of the Constitution because the classification was reasonable. The Court, however, through Mr. Justice Peckham, laid down the following rule of classification (p. 521):

> ". . . the question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

The right of the Commissioner, as an administrative official, to construe a statute of Congress should be confined within its proper limits. No power rests in him to subject an article to taxation which can not be brought within the terms of the statute, reasonably construed. The rule of reason by which Congress itself is bound in the classification of taxable subjects is and should be even more stringent in its application to an administrative officer charged with the interpretation and enforcement of the will of Congress.

The respondent respectfully submits that the ruling in S. T. 567 has no foundation in reason, that it constitutes an unconstitutional discrimination against manu-

facturers of jig saw picture puzzles in excess of 50 pieces, and that the imposition of the tax in controversy on the basis of this ruling is without legislative sanction and a deprivation of property without due process of law.

X. THE OUIJA BOARD AND SLOT MACHINE CASES DISTINGUISHED.

Petitioner relies upon two cases, neither of which is authority for the contentions advanced by him in the case at bar.

> *Baltimore Talking Board Co. Inc.* v. *Miles,* 280 Fed. 658 (C. C. A. 4, 1922), cert. denied, 259 U. S. 587.
>
> *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476 (Ct. Cl: 1931). cert. denied, 285 U. S. 547.

In the *Baltimore Talking Board Co. case, supra,* the Court held that a Ouija board was a game within the meaning of Section 900 of the Revenue Act of 1918. That decision, however, rests upon the fact that there was evidence that the plaintiff had obtained a patent which described the Ouija board as follows (p. 660):

> "The object of the invention is to produce *a game with which two or more persons can amuse themselves* by asking questions and having them answered by the device used and operated by the touch of the hand, so that the answers are designated by the letters of the alphabet." (Italics ours.)

The effect to be given to the specifications of a patent is likewise shown in the case of *Eaton* v. *American Chain Co.,* 63 F. (2d) 783 (C. C. A. 2, 1933) as to which the Court said in the case of *Routzahn* v. *Willard Storage Battery Co.,* 65 F. (2d) 89 (C. C. A. 6, 1933), at page 92:

"The articles on which alleged erroneous taxes were assessed in the latter case were 'Weed Chains'. There was no showing that the specific chains sold, and for which the tax was imposed, were designed and primarily adapted for any other specific use than that on automobiles. Moreover, the development of tire chains followed the development and general use of the automobile, and was in response to a need presented by it. Finally, 'Weed Chains' are articles covered by United States patent, and the patent clearly specifies them as primarily useful on automobiles to prevent skidding. *It may well have been thought that the description and specification of the patent, without more, are conclusive on the question of their primary adaptability.* See, also, *Philadelphia Storage Battery Co.* v. *Lederer* (D. C.) 21 F. (2d) 320; *General Lead Batteries Co.* v. *United States,* (Ct. Cl.) 60 F. (2d) 177." (Italics ours.)

Moreover the defendant in the Ouija board case introduced envelopes, boxes and boards with directions printed thereon setting out the well known method of operating the board. In the case at bar, however, the record discloses that there are no rules for the solution of a jig saw picture puzzle (R. 16, 26, 31).

Circuit Judge Woods, who delivered the opinion of the Court, said (pp. 661, 662):

"In view of the comprehensive scope of the Revenue Act, the common knowledge that the Ouija board is so generally used as a means of amusement, *the fact that the Patent Office issued a patent describing it as a game,* the presumption that the revenue officers correctly found *it was so used* after

investigation, *and the absence of any testimony to the contrary,* we think the finding of the District Judge had adequate support in the testimony and therefore cannot be reversed by this Court." (Italics ours.)

The statement of the Court that (p. 661):

"The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries; that is, articles not reasonably necessary to comfort according to the average standards of American life . . ."

had no specific reference to the phrase "games and parts of games" in Section 900 (5) of the 1918 Act but was directed to Section 900 in its entirety. This section, in addition to taxing games and sporting goods, imposed a tax upon a wide variety of articles named in its twenty-one subdivisions, including such articles as automobiles, automobile parts and accessories, musical instruments, chewing gum, candy, films, firearms, hunting knives and guns, electric fans, thermos bottles, smokers' articles, slot machines, liveries, fur goods, pleasure boats and toilet soaps. The Court could not have meant that all luxuries were taxable under this statute since it expressly said that the intention was disclosed to tax the sale of "all articles which were thought of and named".[5]

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[5] There is indeed a question whether the excise taxes imposed under Title IV of the Revenue Act of 1932 are taxes on luxuries. Most of the articles have come to be considered necessaries under present standards of life. In the minority report of the House Committee on Ways and Means on House Joint Resolution 375 extending these excise taxes from June 30,

It is respectfully submitted that, if the Ouija board case holds that any article or instrumentality "not reasonably necessary to comfort according to the average standards of American life" is taxable as a game, if used for "amusement and diversion", such a construction is too broad and that the refusal of the Circuit Court of Appeals to adopt such a construction was entirely correct. *Illfelder* v. *United States,* T. D. 31115, 19 T. D. 59.

In the course of his dissenting opinion in the Ouija board case, Circuit Judge Knapp said (p. 662):

> "I am not convinced that the Ouija board is a game, within the meaning of the Revenue Act or otherwise. The standard definition of the term, which reflects its common acceptation, namely, 'A contest for success or superiority in a trial of chance, skill or endurance, or any two or all three of these combined', clearly does not include the device in question, since it has no relation to a contest of any sort. And if we take the term in its broadest sense, 'A play, or sport for amusement', we still have always the element or idea of winning, of success or superiority, of accomplishing a definite and

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1937 to June 30, 1939 (Report No. 935, 75th Congress, 1st Session) it was said (p. 21):

> "The so-called 'nuisance taxes' are all consumption taxes, which fall most heavily on the poor and those least able to pay. They are also discriminatory, in that they apply only to certain selected items."

In the debate on this resolution on June 24, 1937 on the floor of the Senate Mr. Vandenberg said (Congressional Record, 75th Congress, 1st Session, Vol. 81, p. 8167):

> "I doubt if any tax bill that comes before the Senate reaches a larger number of American people than does this one, because it puts what is nothing more nor less than a sales tax upon numerous commodities which enter into the daily life of every man, woman and child in the land."

desired result. In no substantial respect does the Ouija board answer this description. In short, it lacks the essential and ever-present characteristic of a game, under any accepted definition of the term.

"The general clause of the section, 'games and parts of games', must be construed, under the familiar doctrine of *ejusdem generis,* as embracing only articles of some similarity to those specifically mentioned. But the Ouija board has no real likeness in construction or use to any of the specified articles."

Aside from the well-reasoned dissenting opinion of Judge Knapp, the cogency of whose view is urged upon this Court, the facts in the Ouija board case are so different from those established on this record that the decision in that case can be of no force as a controlling precedent in the case at bar. There is a complete absence of similarity between the Ouija board and the jig saw picture puzzles here in controversy. In that case the taxpayer had obtained a patent which described the article as a game. The jig saw picture puzzles here in controversy, however, were not patented. In that case the article was accompanied with printed directions for its operation. In the case at bar the uncontradicted testimony discloses that there are no rules for the solution of a jig saw picture puzzle (R. 16, 26, 31). In that case there was no testimony that the article was not a game. In the case at bar the overwhelming and undisputed testimony established the fact that a jig saw picture puzzle is not a game, either in the terminology of the trade or in common parlance. As the Circuit Court of Appeals pointed out in its opinion (R. 61), the par-

ticular article here sought to be taxed is a *puzzle,* which is defined as "a contrivance designed for testing ingenuity". Obviously the Ouija board is not such a contrivance and therefore has no similarity to the article in controversy.

Moreover, there was no evidence in that case, as abundantly appears on this record, of a long-established executive practice or construction under which the tax on "games" was not held to be applicable to jig saw picture puzzles; nor was there any evidence in that case of vacillation and uncertainty on the part of the Commissioner as is disclosed by the contradictory rulings which are in evidence in the case at bar.

With respect to the *Mills Novelty Co. case, supra,* the respondent contends that this decision, as the Circuit Court of Appeals held (R. 62), supports his position rather than that of the petitioner. The majority opinion clearly points out that the slot machines in question were games of chance between the owner of the machine and the operator, in other words, a game of contest in which at least two persons engaged. The Court said, in the course of its opinion (pp. 477, 478):

> "The machines involved in the case were operated by placing a coin in a slot, and were so designed that the operators thereby obtained a chance as against the owner of the machine of winning or losing through the operation."
>
> . . . . . .
>
> ". . . It is obvious that the results are the same as they would be if the owner set in motion the machine upon receiving the coin. If, instead of this automatic machine, the owner had had one of those gambling devices in which a wheel is used which

revolves when set in motion by the owner, and by chance stops at a certain point, we think no one would contend that a game was not being played. We do not think it makes any difference under the law whether the one that takes the other side of the wager constructs a machine that will operate in his absence or operates it personally. Clearly the effect is the same."

. . . . . .

". . . In the instant case the operator staked money on the result of the operation of the machine. The machine was supplied with money by the owner, and, if the operator was fortunate enough to have its revolutions result in his favor, money of the owner was released and dropped into a receptacle where the party playing the machine could take it; otherwise the operator lost the coin which he had put in the machine. In operating the machine the user simply put up his money at long odds against the money of the owner of the machine."

. . . . . .

"In our opinion, *the gambling machines involved in the case were articles or apparatus used in playing a game as the word is used in the statute,* and, if we are correct in this, it follows that the plaintiff was subject to the tax in controversy . . ." (Italics ours.)

Petitioner argues (Br., p. 13) that, just as in the case of the slot machine there is competition against the absent owner, so in the case of the jig saw puzzle there is competition against the absent manufacturer. This argument is no less fanciful than the argument that

there is competition against time. So far as the slot machine is concerned there is clearly competition, since the absent owner has deposited his own money in the machine which he is gambling against that of the operator. This element is completely absent in the case of jig saw picture puzzles.

In view of all these considerations, it is respectfully urged that the Circuit Court of Appeals properly held that jig saw picture puzzles are not taxable as "games" under Section 609 of the Revenue Act of 1932.

CONCLUSION.

For all of the foregoing reasons it is respectfully submitted that the decision of the Circuit Court of Appeals is correct and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1937.

Thomas W. White, Individually and as Former Collector of Internal Revenue, Petitioner,
vs.
Philip J. Aronson, Trustee.

Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 8, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent, Aronson, trustee in bankruptcy of The Viking Manufacturing Company, Inc., brought suit in the United States District Court for Massachusetts to recover $37,021.63 exacted of the bankrupt by the Collector, under color of Sec. 609 Revenue Act 1932,[1] (c. 209, 47 Stat. 264), on account of jig saw picture puzzles manufactured and sold from June 21, 1932, to May 1, 1933.

The puzzles were made by cutting selected pictures backed up by rigid cardboard into from 162 to 500 separate pieces. These were sold to those who found diversion or amusement in putting them together so as to reproduce the original picture.

Obviously the word "games" in the statute was intended to designate instrumentalities used in playing them.

The Collector maintained that the effort properly to arrange the pieces was for amusement or diversion and amounted to a game,

[1] Revenue Act 1932. Sec. 609. Tax on Sporting Goods.
There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods.

within the appropriate definition of the word.[2] Accordingly, he said, these instrumentalities were taxable.

On the other hand, respondent insisted that the word "games" refers to contests, physical or mental, conducted according to set rules, undertaken for amusement or recreation or for winning a stake, requiring the participation of two or more persons;[2] also that the sundry pieces were parts of a puzzle, a contrivance designed for testing ingenuity—something not within the scope of the statute.[3]

The trial judge, having heard the cause upon pleadings and evidence without a jury, sustained the Collector's defense. The Circuit Court of Appeals concluded otherwise and directed judgment for the trustee. It said—

"The section [609] is headed 'Tax on Sporting Goods.' The articles or instrumentalities there specifically named are sporting goods whether they are used in connection with games or in some recreation or diversion other than a game. But the larger portion of the articles specifically named are all used in games of contest between two or more persons, and the question of construction is whether the articles or instrumentalities intended to be covered by the phrase 'games and parts of games' means articles or instrumentalities used in games of contest like the specific articles previously named in the section, which are used in games of tennis, polo, baseball, etc., all of which involve a contest. . . .

"Furthermore the particular article here sought to be taxed is a puzzle. A puzzle is defined as 'something which perplexes or embarrasses; a difficult problem or question; hence a toy, contrivance, question or problem designed for testing ingenuity; as a cross word puzzle.' Webster's New International Dictionary. A jig saw picture puzzle comes squarely within this definition—'a contrivance . . . designed for testing ingenuity.' None of the articles specifically named in the statute and used in games is a contrivance designed for testing ingenuity. They are designed for use in games of contest, while a jig saw puzzle is not."

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[2] Webster's New International Dictionary 2d Ed., gives the word game 17 definitions. "2 a An amusement or diversion; as, make-believe is a children's game; formerly, specif., amorous play, 'Daughters of the game.' Shak." "4. A contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake * * *."

[3] "Puzzle. 2. Something which perplexes or embarrasses; a difficult problem or question; an enigma; hence, a toy, contrivance, question, or problem designed for testing ingenuity; as, a crossword puzzle." Webster's New International Dictionary 2d Ed.

Section 600 (f), (c. 63, 40 Stat. 316) Revenue Act 1917, and Sec. 900 (5), (c. 18, 40 Stat. 1122) Revenue Act 1918, (repealed in 1921) laid a tax upon tennis rackets, golf clubs, baseball bats, etc., . . . "chess and checker boards and pieces, dice, games and parts of games". Jig saw picture puzzles were then well known articles of commerce. They go back at least to the first part of the last century—perhaps much farther. The same words "games or parts of games" appear again in the like section—609—Revenue Act 1932.

The court below pointed out that—

"A jig saw puzzle was never taxed under Section 900 (5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that jig saw or die cut picture puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces."

Ample evidence disclosed that in commercial usage jig saw picture puzzles were never regarded as games; also that the trade recognized a definite distinction between puzzles and games. We must assume that Congress had knowledge of these things; also knew that jig saw picture puzzles were not assessed for taxes under the acts of 1917 and 1918; and, further, was not unmindful of the uncertainties concerning the meaning of "game" disclosed by *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, and *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476.

The claim for the taxpayer here does not rest upon an exception to a general rule but upon construction of general language found in the act.

The Circuit Court of Appeals rightly concluded that—"The words 'games and parts of games' bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are, and with which they are closely associated."

Certainly we cannot say that this construction was clearly erroneous. Other judges had accepted it. Nor can we affirm that the

statute as framed gave adequate notice to the bankrupt that its puzzles were to be taxed.

Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. *Gould v. Gould,* 245 U. S. 151. "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them." *Philadelphia Storage Battery Co.* v. *Lederer,* 21 F. (2d) 320, 321, 322.

Counsel for the Collector maintain that *Baltimore Talking Board Co.* v. *Miles,* (1922), *supra,* the *"Ouija Board"* case, and *Mills Novelty Co.* v. *United States,* (1931), *supra, "Coin Operated Gambling Machine"* case, are in conflict with the ruling under review.

These causes involved the act of 1918 and in both the judges expressed sharply opposing views. Of course, the general language of the opinions must be read in connection with the facts.

The ouija board is wholly different from the puzzle here under consideration; nothing indicates that it was commonly regarded by the trade as a puzzle; and in an application for a patent it had once been described as a game. If the opinion construes the statute as embracing all instrumentalities, not necessary for comfort, whose chief use is to afford amusement and diversion, it is obviously too broad. Knitting for diversion is not a "game"; nor is horseback riding.

The coin operated gambling machine has no resemblance to a jig saw picture puzzle and what was said concerning it is not helpful in the problem now before us.

Both of these causes were decided prior to the act of 1932 in which the words of the 1918 act were repeated notwithstanding the disclosed uncertainties concerning their meaning and with knowledge of the fact that theretofore puzzles had not been assessed for taxation under them.

The challenged judgment must be

Affirmed.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result.